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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 676.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY, CLAYTON J. McPHAIL, BURT T. COOL and RICHARD A. ALTMEIER,

Petitioners,

vs.

COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO, and THE HONORABLE JOHN J. CONNORS,

Respondents.

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI.

CHARLES H. BRADY, ESQ.,
RAYMOND S. METZGER, JR., ESQ.,
BRADY, WHITEHEAD, SIMMONS, METZGER & HAMILTON,
810 Edison Building,
Toledo, Ohio 43604,
Attorneys for Respondents.

JOHN M. CURPHEY, ESQ.,
ROBISON, CURPHEY & O'DONNELL,
425 L-O-F Building,
Toledo, Ohio 43624,
Attorneys for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-8647

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STATEMENT OF THE CASE.

Respondents demurred to a petition for a writ of prohibition filed by petitioners in the Supreme Court of Ohio as an original action and the demurrer of the respondents was sustained by the Supreme Court of Ohio. The basis of the alleged right for a writ of prohibition arises out of the overruling of a motion for summary judgment filed by parties defendant, specifically Clayton J. McPhail, Burt T. Cool and Richard A. Altmeier, the individual petitioners herein, who are being sued in the Common Pleas Court of Lucas County, Ohio for damages arising out of alleged wrongful, unlawful and malicious acts of these three individuals in concocting false and fraudulent statements

and which the said three individual defendants knew were false, with the intent to discredit the plaintiff, Mr. Emery Gensler, and reflect on said plaintiff's character and ability causing said plaintiff to lose face and standing within the Brotherhood of Locomotive Firemen and Enginemen and further causing damage to Mr. Gensler's reputation among the entire membership of said Brotherhood. The three named individuals were employed by The Detroit and Toledo Shore Line Railroad Company and were working in a managerial capacity for said railroad at the time of their deliberate and intentional acts of conspiracy to "wreck" the reputation of Mr. Gensler among his fellow workers.

The pending action in the Lucas County Common Pleas Court, as it presently stands and as the said Court intends to proceed with it, is against the said three individual persons above named. The railroad company is neither a party to the action nor a necessary party to this action. It is the acts of the said three named individuals working in concert that caused the injury to Mr. Gensler and for which he seeks redress of this wrong through the Court of Common Pleas of Lucas County, Ohio.

REASONS FOR NOT GRANTING WRIT.

The petitioning railroad here would like the Court to believe that it also is a party to the action in the Lucas County Common Pleas Court, same being Cause No. 197978. The railroad is not a party to that said action. When the Lucas County Common Pleas Court assumed jurisdiction over this civil action as above described, it did so based on its right as a court of general jurisdiction to determine its own jurisdiction over both the person and the subject matter in an action before it. It was so held in *State, ex rel. Mansfield Telephone Co. vs. Mayer, et al., Judges,* 5 Ohio St. 2d 222 and affirmed by the Supreme Court of Ohio in *State, ex rel. Toledo Shore Line Rd. Co. vs. Court of Common Pleas,* 11 Ohio St. 2d 193, 228 N. E. 2d 313 (1967). The Court in determining that it had the right, authority and duty to sit in judgment on the case pending therein was then faced with a petition for a writ of prohibition to prevent the said Lucas County Common Pleas Court from assuming the jurisdiction over the pending cause. The opinion of the Supreme Court of Ohio spells out the fact that the railroad company is not a party in the action and that the other relators, the individual petitioners herein, are being sued as individuals. Based on this information, the Supreme Court of Ohio denied the writ of prohibition when it had been previously determined by the Court of Common Pleas that it could take jurisdiction over the subject matter of the case and when it had previously been agreed that the ruling on a demurrer would be dispositive of the action. It should further be pointed out that the National Railroad Adjustment Board would have no jurisdiction to determine this type of an action. This Supreme Court recognizes that a railroad must be involved as a party in order for the Adjustment Board to have any jurisdiction.

Petitioners herein continually refer to the case pending in the Common Pleas Court of Lucas County as a grievance when, in fact, this erroneous assumption is done for the purpose of trying to bring this case under the authority and jurisdiction of the Railroad Adjustment Board and all of the cases cited in the brief of the petitioners herein deal with grievances and the power of the Adjustment Board to hear such grievances.

Respondents are not arguing the authority of the Adjustment Board in proper circumstances. It is only when because an action upon which the writ is sought deals with civil matters not involving the railroad company that the Adjustment Board has no right to assume to have any authority. Basically, the problem as presented is one that does not qualify the Adjustment Board to hear the cause of action because:

a. There is no railroad involved. This is an action between three individuals who worked in a supervisory capacity for the railroad and on their own initiative and through their efforts as individuals caused a fellow employee to have his reputation injured among his fellow employees as the result of their wrongful, fraudulent, malicious and unlawful acts. This is a civil action for redress of the wrong done by three persons to a fourth person.

b. The Railroad Adjustment Board has absolutely no jurisdiction or authority to award exemplary or punitive damages for an action committed by one or more employees against another employee and much as the petitioners here would desire to make the railroad a party to this action the said railroad is not such a party and therefore the writ of prohibition as sought is erroneously sought and this Honorable Court should deny the granting of certiorari.

CONCLUSION.

As has heretofore been stated, the parties involved in the original action as parties defendant in the Lucas County Common Pleas Court are three individual men. There is no railroad involved in said cause of action. Therefore, the attempt on the part of petitioners here to make the railroad a party petitioner is wrong and improper and the allegations are an attempt to mislead this Court into believing that the wrong charged to the three individual men by the plaintiff in the original action is charged against the railroad arising out of a grievance. That this is not true has been heretofore spelled out in this brief. The type of action as well as the parties thereto, all being individuals, cannot give the Adjustment Board any jurisdiction and a writ of prohibition to prohibit the Common Pleas Court of Lucas County from hearing the pending cause would not be proper under such circumstances. Therefore, the judgment of the Ohio Supreme Court should be affirmed and the petition for a writ of certiorari denied.

The basis of the request for said writ is not and has not been a grievance against the railroad but rather a civil action against three individuals.

Respectfully submitted,

CHARLES H. BRADY, ESQ.,
RAYMOND S. METZGER, JR., ESQ.,
BRADY, WHITEHEAD, SIMMONS, METZGER & HAMILTON,
Attorneys for Respondents.